

FROM THE COMMITTEE ON MODEL CIVIL JURY INSTRUCTIONS

The Committee has adopted the following amended model civil jury instructions effective October 17, 2013.

ADOPTED

The Committee has adopted amended instructions for use in third-party no fault cases.

M Civ JI 36.04

No-Fault Auto Negligence: Elements of Burden of Proof—Explanation of Noneconomic-Economic Distinction

The plaintiff claims two different types or classes of damages in this case. The elements which the plaintiff has the burden of proving with respect to each type of damages are somewhat different. The first type or class of damages is generally referred to as “noneconomic” loss damages and consists of such things as [Insert those applicable noneconomic loss damages for which the plaintiff seeks recovery in this case].

The second type or class of damages sought by plaintiff is generally referred to as “economic” loss damages and consists of [For insured defendants, insert those applicable economic loss damages suffered by the plaintiff in excess of compensable no-fault benefits for which plaintiff seeks recovery: for the first three years, amounts in excess of no-fault benefits for work loss, allowable expenses, and survivors’ loss, and, for the period after three years, all work loss, allowable expenses, and survivors’ loss. For uninsured defendants, insert any economic loss damages].

As I indicated, what the plaintiff must prove differs somewhat depending on which type of damages claim is being considered—economic or noneconomic loss damages. I will now instruct you regarding the elements which the plaintiff must prove.

Note on Use

Both insured and uninsured motorist tortfeasors have immunity from tort liability for noneconomic loss damages, except where the injured person has suffered death, serious impairment of body function, or permanent serious disfigurement. *Auto Club Insurance Ass’n v Hill*, 431 Mich 449; 430 NW2d 636 (1988). However, the uninsured motorist tortfeasor (unlike the insured motorist tortfeasor) has no tort immunity for economic loss damages. Hill.

Under MCL 500.3135(3)(c) (formerly MCL 500.3135(2)(c)), serious impairment need not be proven to recover economic loss damages in excess of no-fault benefits. *Cassidy v McGovern*, 415 Mich 483; 330 NW2d 22 (1982); *Cochran v Myers*, 146 Mich App 729; 381 NW2d 800 (1985); lv denied, 426 Mich 867; 387 NW2d 387 (1986). Damages for loss of earning capacity are not recoverable in tort under the no-fault act. Loss of earnings, however, is an economic loss damage, and as such is recoverable in tort if it is in excess of no-fault benefits received for “work loss” as that term is defined in MCL 500.3107–.3110. “Work loss” as defined in those sections does not include loss of earning capacity. *Argenta v Shahan (and Ouellette v Kenealy)*, 424 Mich 83; 378 NW2d 470 (1985).

MCL 500.3135(3) abolishes tort liability of drivers and owners of insured vehicles with exceptions listed in that subsection. MCL 500.3135(3)(c) identifies recoverable economic damages but does not include replacement services. *Johnson v Recca*, 492 Mich 169, 821 NW2d 520 (2012).

This instruction should be given in those cases where the plaintiff is seeking to recover for both economic and noneconomic losses. It should be read immediately before the burden of proof instructions with regard to noneconomic and economic loss damages.

History

M Civ JI 36.04 was added November 1980.
Amended September 1989, October 2013.

M Civ JI 36.06

No-Fault Auto Negligence: Burden of Proof—Economic Loss

*(As to plaintiff’s claim for economic loss damages,) the plaintiff has the burden of proof on each of the following:

a. that the defendant was negligent in one or more of the ways claimed by the plaintiff as stated to you in these instructions.

b. that the plaintiff sustained damages consisting of [For insured defendants, insert those applicable economic loss damages suffered by the plaintiff in excess of compensable no-fault benefits for which plaintiff seeks recovery: for the first three years, amounts in excess of no-fault benefits for work loss, allowable expenses, and survivors’ loss, and, for the period after three years, all work loss, allowable expenses, and survivors’ loss. For uninsured defendants, insert any economic loss damages.]

c. that the negligence of the defendant was a proximate cause of plaintiff’s damages.

†(The defendant has the burden of proof on [his / her] claim that the plaintiff was negligent in one or more of the ways claimed by the defendant as stated to you in these

instructions, and that such negligence was a proximate contributing cause of plaintiff's damages.)

‡(Your verdict will be for the plaintiff if [he / she] sustained damages consisting of [description of allowable economic losses sought by plaintiff] and defendant was negligent, and such negligence was a proximate cause of plaintiff's damages.)

‡(Your verdict will be for the defendant if plaintiff did not sustain damages consisting of [description of allowable economic losses sought by plaintiff], or if the defendant was not negligent, or, if negligent, such negligence was not a proximate cause of plaintiff's damages.)

†(If you find that each party was negligent and that the negligence of each party was a proximate cause of plaintiff's damages, then you must determine the degree of such negligence, expressed as a percentage, attributable to the plaintiff. Negligence on the part of the plaintiff does not bar recovery by the plaintiff against the defendant. However, the percentage of negligence attributable to the plaintiff will be used by the Court to reduce the amount of damages which you find to have been sustained by the plaintiff.)

The Court will furnish you with a Special Verdict Form that will list the questions you must answer. Your answers to the questions will constitute your verdict.

Note on Use

If the injury resulted in death, the words, "plaintiff's decedent" should be substituted where appropriate.

Both insured and uninsured motorist tortfeasors have immunity from tort liability for noneconomic loss damages, except where the injured person has suffered death, serious impairment of a body function, or permanent serious disfigurement. *Auto Club Insurance Ass'n v Hill*, 431 Mich 449; 430 NW2d 636 (1988). However, the uninsured motorist tortfeasor (unlike the insured motorist tortfeasor) has no tort immunity for economic loss damages. *Hill*.

MCL 500.3135(3) abolishes tort liability of drivers and owners of insured vehicles with exceptions listed in that subsection. MCL 500.3135(3)(c) identifies recoverable economic damages but does not include replacement services. *Johnson v Recca*, 492 Mich 169, 821 NW2d 520 (2012). See MCL 500.3135(3)(c) (formerly MCL 500.3135(2)(c)) for allowable economic loss damages.[

*The phrase in parentheses should only be given if the case includes both economic and noneconomic loss damages.

†If comparative negligence is not an issue in the case, the paragraph concerning defendant's burden of proof and the next-to-last paragraph of this instruction should not be read to the jury.

‡The two parenthetical paragraphs beginning with the words "Your verdict" are not necessary if a special verdict form is used.

History

M Civ JI 36.06 was added November 1980.

Amended September 1989, November 1995, October 2013.

M Civ JI 36.15

No-Fault Auto Negligence: Burden of Proof—Economic and/or Noneconomic Loss (To Be Used in Cases in which 1995 PA 222 Applies)*

In order to recover damages for either economic or noneconomic loss, plaintiff has the burden of proof on each of the following three elements:

- a. that the defendant was negligent;
- b. that the plaintiff was injured;
- c. that the negligence of the defendant was a proximate cause of injury to the plaintiff.

ECONOMIC LOSS

If you decide that all of these have been proved, then (subject to the rule of comparative negligence, which I will explain) plaintiff is entitled to recover damages for economic loss resulting from that injury, including: [For insured defendants, insert those applicable economic loss damages suffered by the plaintiff in excess of compensable no-fault benefits for which plaintiff seeks recovery: for the first three years, amounts in excess of no-fault benefits for work loss, allowable expenses, and survivors' loss, and, for the period after three years, all work loss, allowable expenses, and survivors' loss. For uninsured defendants, insert any economic loss damages.], that you determine the plaintiff has incurred.

[Read only if applicable.] If you find that plaintiff is entitled to recover for work loss beyond what is recoverable in no-fault benefits, you must reduce that by the taxes that would have been payable on account of income plaintiff would have received if he or she had not been injured.

NONECONOMIC LOSS

As to plaintiff's claim for damages for noneconomic loss, plaintiff has the burden of proving a fourth element:

d. that plaintiff's injury resulted in [death / serious impairment of body function / or / permanent serious disfigurement].

If you decide that all four elements have been proved, then (subject to the rule of comparative negligence, which I will explain) plaintiff is entitled to recover damages for noneconomic loss that you determine the plaintiff has sustained as a result of that [death / injury].

COMPARATIVE NEGLIGENCE

The defendant has the burden of proof on [his / her] claim that the plaintiff was negligent and that such negligence was a proximate cause of plaintiff's [injury / death].

If your verdict is for the plaintiff and you find that the negligence of both parties was a proximate cause of plaintiff's [injury / death], then you must determine the degree of such negligence, expressed as a percentage, attributable to each party.

Negligence on the part of the plaintiff does not bar recovery by plaintiff against the defendant for damages for economic loss. However, the percentage of negligence attributable to the plaintiff will be used by the court to reduce the amount of damages for economic loss that you find were sustained by plaintiff.

Negligence on the part of the plaintiff does not bar recovery by plaintiff against the defendant for damages for noneconomic loss unless plaintiff's negligence is more than 50 percent. If the plaintiff's negligence is more than 50 percent, your verdict will be for the defendant as to plaintiff's claim for damages for noneconomic loss. Where the plaintiff's negligence is 50 percent or less, the percentage of negligence attributable to plaintiff will be used by the court to reduce the amount of damages for noneconomic loss that you find were sustained by the plaintiff.

The Court will furnish a Special Verdict Form that will list the questions you must answer. Your answers to the questions in the verdict form will constitute your verdict.

Note on Use

*1995 PA 222 contains a definition of "serious impairment of body function" that applies to all cases filed on or after March 28, 1996. See *May v Sommerfield*, 239 Mich App 197; 607 NW2d 422 (1999). 1995 PA 222 also bars recovery of damages for noneconomic loss if (1) a plaintiff is more than 50 percent at fault or (2) a plaintiff is uninsured and is operating his or her own vehicle at the time of the injury. MCL 500.3135(2)(b),(c). These two provisions are effective for cases filed on or after July 26, 1996, but they do not affect a plaintiff's right to recover excess economic loss damages.

This instruction applies to a case that includes claims for damages for both economic and noneconomic loss. If the case involves only one of these types of damages, this

instruction must be modified. For example, if only noneconomic loss damages are claimed, the trial judge should read the four elements a.–d. together; delete the section titled “Economic Loss”; and delete the third-from-last paragraph of this instruction. This instruction should also be modified by deleting the first four paragraphs under the section titled “Comparative Negligence” if plaintiff’s negligence is not an issue in the case.

An uninsured plaintiff operating his or her own vehicle at the time of the injury is not entitled to noneconomic loss damages, but may recover excess economic loss damages. See MCL 500.3135(2)(c), added by 1995 PA 222.

Both insured and uninsured motorist tortfeasors have immunity from tort liability for noneconomic loss damages, except where the injured person has suffered death, serious impairment of a body function, or permanent serious disfigurement. *Auto Club Insurance Ass’n v Hill*, 431 Mich 449; 430 NW2d 636 (1988). However, the uninsured motorist tortfeasor (unlike the insured motorist tortfeasor) has no tort immunity for economic loss damages. *Hill*.

See MCL 500.3135(3)(c) (formerly MCL 500.3135(2)(c)) for allowable economic loss damages. MCL 500.3135(3) abolishes tort liability of drivers and owners of insured vehicles with exceptions listed in that subsection. MCL 500.3135(3)(c) identifies recoverable economic damages but does not include replacement services. *Johnson v Recca*, 492 Mich 169, 821 NW2d 520 (2012).

In suits against an insured defendant, MCL 500.3135(3)(c) requires a reduction for the tax liability the injured person would have otherwise incurred. The “tax reduction” instruction should only be included if there is evidence to support it.

Comment

The no-fault law has not abolished the common law action for loss of consortium by the spouse of a person who receives above-threshold injuries. *Rusinek v Schultz, Snyder & Steele Lumber Co*, 411 Mich 502; 309 NW2d 163 (1981).

A plaintiff who is more than 50 percent at fault is not entitled to noneconomic loss damages. MCL 500.3135(2)(b), added by 1995 PA 222.

History

M Civ JI 36.15 was added June 1997.
Amended December 1999, October 2013.

M Civ JI 67.17

Form of Verdict: No-Fault Auto Negligence: (As Applicable) Economic Loss and Noneconomic Loss—and Comparative Negligence/Single or Multiple Defendants/Allocation of Fault

We, the jury, answer the questions submitted as follows:

QUESTION NO. 1: Was [name of defendant A] negligent?

Answer: ____ (yes or no)

If your answer is "yes" or "no," go on to Question No. 2.

*QUESTION NO. 2: Was [name of defendant B] negligent?

Answer: ____ (yes or no)

If your answer is "yes," go on to Question No. 3.

If your answer is "no" and your answer to Question No. 1 is "yes," go on to Question No. 3.

If your answer is "no" and your answer to Question No. 1 is "no," do not answer any further questions.

QUESTION NO. 3: Was the plaintiff injured?

Answer: ____ (yes or no)

If your answer is "yes" and your answer to Question No. 1 is "yes," go on to Question No. 4.

If your answer is "yes," your answer to Question No. 1 is "no," and your answer to Question No. 2 is "yes," go on to Question No. 5.

If your answer is "no," do not answer any further questions.

QUESTION NO. 4: Was [name of defendant A] 's negligence a proximate cause of the plaintiff's [injury / injuries]?

Answer: ____ (yes or no)

If your answer is "yes" and your answer to Question No. 2 is "yes," go on to Question No. 5.

If your answer is "no" and your answer to Question No. 2 is "yes," go on to Question No. 5.

If your answer is "yes" and your answer to Question No. 2 is "no," go on to Question No. 6.

If your answer is "no" and your answer to Question No. 2 is "no," do not answer any further questions.

*QUESTION NO. 5: Was [name of defendant B] 's negligence a proximate cause of the plaintiff's [injury / injuries]?

Answer: ____ (yes or no)

If your answer is "yes," go on to Question No. 6.

If your answer is "no" and your answer to Question No. 4 is "yes," go on to Question No. 6.

If your answer is "no" and your answer to Question No. 4 is "no," do not answer any further questions.

PLAINTIFF'S NEGLIGENCE

QUESTION NO. 6: Was the plaintiff negligent?

Answer: ____ (yes or no)

If your answer is "yes," go on to Question No. 7.

If your answer is "no" and your answers to both Questions No. 4 and 5 are "yes," do not answer Question No. 7; go on to Question No. 8.

If your answer is "no" and you answered "no" to either Question No. 4 or Question No. 5, do not answer Question No. 7 or Question No. 8; go on to Question No. 9.

QUESTION NO. 7: Was the plaintiff's negligence a proximate cause of the plaintiff's [injury / injuries]?

Answer: ____ (yes or no)

If your answer is "yes," go on to Question No. 8.

If your answer is "no" and your answers to Questions No. 4 and 5 are "yes," go on to Question No. 8.

If your answer is "no" and you answered "no" to either Question No. 4 or Question No. 5, do not answer Question No. 8; go on to Question No. 9.

QUESTION NO. 8:

A.

If you answered "yes" to Question No. 4, then using 100 percent as the total, enter the percentage of negligence attributable to [name of defendant A]:

____ percent

*B.

If you answered "yes" to Question No. 5, then using 100 percent as the total, enter the percentage of negligence attributable to [name of defendant B]:

____ percent

C.

If you answered "yes" to Question No. 7, then using 100 percent as the total, enter the percentage of negligence attributable to the plaintiff:

_____ percent

The total of these must equal 100 percent:

TOTAL

100 percent

ECONOMIC LOSS CLAIM

QUESTION NO. 9: Did the plaintiff's injury result in damages for economic loss for [For insured defendants, insert those applicable economic loss damages suffered by the plaintiff in excess of compensable no-fault benefits for which plaintiff seeks recovery: for the first three years, amounts in excess of no-fault benefits for work loss, allowable expenses, and survivors' loss, and, for the period after three years, all work loss, allowable expenses, and survivors' loss. For uninsured defendants, insert any economic loss damages] to the present date?

Answer: _____ (yes or no)

If your answer is "yes", go on to Question No. 10.

If your answer is "no", do not answer Question No. 10; go on to Question No. 12.

QUESTION NO. 10: What is the total amount of the plaintiff's damages for economic loss to the present date?

Answer: \$_____._____

[Please note that the judge will reduce the total amount of the plaintiff's damages for economic loss by the percentage of negligence attributable to the plaintiff, if any, entered in Question No. 8.]

QUESTION NO. 11: Will plaintiff sustain economic damages in the future for

[For insured defendants, insert those applicable economic loss damages suffered by the plaintiff in excess of compensable no-fault benefits for which plaintiff seeks recovery: for the first three years, amounts in excess of no-fault benefits for work loss, allowable expenses, and survivors' loss, and, for the period after three years, all work loss, allowable expenses, and survivors' loss. For uninsured defendants, insert any economic loss damages.]?

Answer: _____ (yes or no)

If your answer is “yes”, go on to Question No. 12.

If your answer is “no”, do not answer Question No. 12; go on to Question No. 13.

QUESTION NO. 12: Give the total amount for each year in which the plaintiff will incur economic damages in the future.

ANSWER:

\$_____.____ for [year]

\$_____.____ for [year]

\$_____.____ for [year]

\$_____.____ for [year]

\$_____.____ for [year]

\$_____.____ for [year]

\$_____.____ for [year]

\$_____.____ for [year]

\$_____.____ for [year]

\$_____.____ for [year]

\$_____.____ for [year]

\$_____.____ for [year]

\$_____.____ for [year]

\$_____.____ for [year]

\$_____.____ for [year]

\$_____.____ for [year]

\$_____.____ for [year]

\$_____.____ for [year]

\$_____.____ for [year]

\$_____.____ for [year]

NONECONOMIC LOSS CLAIM

****[NOTE:** If you determined in Question No. 8 that the plaintiff was more than 50 percent at fault, then do not answer any further questions. If you determined in Question No. 8 that the plaintiff was 50 percent or less at fault, then go on to Question No. 13.]

QUESTION NO. 13: Did the plaintiff's injury result in [death / serious impairment of
*****[a body function]¹ [body function]² / or / permanent serious disfigurement]?**

Answer: ____ (yes or no)

If your answer is "yes," go on to Question No. 14.

If your answer is "no," do not answer any further questions.

QUESTION NO. 14: What is the total amount of the plaintiff's damages for noneconomic loss for [Describe noneconomic damages claimed by the plaintiff such as M Civ JI 50.02 Pain and Suffering, Etc., M Civ JI 50.03 Disability and Disfigurement, and M Civ JI 50.04 Aggravation of Preexisting Ailment or Condition] to the present date?

Answer: \$_____.

[Please note that the judge will reduce the total amount of the plaintiff's damages for noneconomic loss by the percentage of negligence attributable to the plaintiff, if any, entered in Question No. 8.]

QUESTION NO. 15: Will plaintiff sustain damages for noneconomic loss in the future for [Describe noneconomic damages claimed by the plaintiff such as M Civ JI 50.02 Pain and Suffering, Etc., M Civ JI 50.03 Disability and Disfigurement, and M Civ JI 50.04 Aggravation of Preexisting Ailment or Condition.]?

Answer: ____ (yes or no)

If your answer is "yes," go on to Question No. 16.

If your answer is "no," do not answer any further questions.

QUESTION NO. 16: Give the total amount for each year in which the plaintiff will incur noneconomic damages in the future.

ANSWER:

\$_____.____ for [year]

\$_____.____ for [year]

\$_____.____ for [year]

\$_____.____ for [year]

\$_____.____ for [year]

\$_____.____ for [year]

\$_____.____ for [year]

\$_____.____ for [year]

\$_____.____ for [year]

\$_____.____ for [year]

\$_____.____ for [year]

\$_____.____ for [year]

\$_____.____ for [year]

\$_____.____ for [year]

\$_____.____ for [year]

\$_____.____ for [year]

\$_____.____ for [year]

\$_____.____ for [year]

\$_____.____ for [year]

\$_____.____ for [year]

[Please note that the judge will reduce the total amount of the plaintiff's damages for noneconomic loss by the percentage of negligence attributable to the plaintiff, if any, entered in Question No. 8.]

Signed,

Foreperson

Date

Note on Use

*Delete Questions No. 2 and 5 and subpart B of Question No. 8 if there is only one defendant.

This verdict form may also be adapted by deleting questions under headings such as "Plaintiff's Negligence," "Economic Loss Claim," and "Noneconomic Loss Claim" if they are not issues in the case.

Deleting questions will require renumbering remaining questions and the references to the deleted questions.

See MCL 500.3135 for economic and noneconomic losses. MCL 500.3135(3) abolishes tort liability of drivers and owners of insured vehicles with exceptions listed in that subsection. MCL 500.3135(3)(c) identifies recoverable economic losses for amounts or periods beyond first-party no-fault benefits: "allowable expenses, work loss, and survivors' loss as defined in sections 3107 to 3110 [MCL 500.3107-.3110]. Excess "replacement services" beyond those recoverable under MCL 500.3107 are not recoverable under MCL 500.3135(3). *Johnson v Recca*, 492 Mich 169 (2012).

**Include the bracketed instructional note for those cases that are controlled by 1995 PA 222. For cases not controlled by this statute, omit the bracketed note.

***In Question No. 13, use bracketed phrase number 2 for cases that are controlled by 1995 PA 222 and bracketed phrase number 1 for cases not controlled by this statute.

This form of verdict is appropriate in a case in which the evidence would allow an award of damages for a 20-year period in the future. The form must be modified by the court to add or delete lines in Questions No. 12 and 16 in cases where the evidence supports an award of damages for a period longer or shorter than 20 years.

Comment

Both insured and uninsured motorist tortfeasors have immunity from tort liability for noneconomic loss damages, except where the injured person has suffered death, serious impairment of body function, or permanent serious disfigurement. *Auto Club Insurance Ass'n v Hill*, 431 Mich 449; 430 NW2d 636 (1988). However, the uninsured motorist tortfeasor (unlike the insured motorist tortfeasor) has no tort immunity for economic loss damages. *Hill*.

In cases in which 1995 PA 222 applies, an uninsured plaintiff (who was operating his or her own vehicle at the time the injury occurred) is not entitled to noneconomic loss

damages. MCL 500.3135(2)(c) , added by 1995 PA 222. This restriction on uninsured plaintiffs does not apply in cases not controlled by 1995 PA 222.

In cases in which 1995 PA 222 applies, a plaintiff who is more than 50 percent at fault is not entitled to noneconomic loss damages. MCL 500.3135(2)(b) , added by 1995 PA 222. This restriction does not apply in cases not controlled by 1995 PA 222.

History

M Civ JI 67.17 was added December 1999.
Amended September 2008, October 2013.

The Michigan Supreme Court has delegated to the Committee on Model Civil Jury Instructions the authority to propose and adopt Model Civil Jury Instructions. MCR 2.512(D). In drafting Model Civil Jury Instructions, it is not the committee's function to create new law or anticipate rulings of the Michigan Supreme Court or Court of Appeals on substantive law. The committee's responsibility is to produce instructions that are supported by existing law.

The members of the Committee on Model Civil Jury Instructions are:

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